ATTORNEY FOR APPELLANT:

KRISTINA L. LYNN
Lynn and Stein, P.C.
Wabash, Indiana

ATTORNEYS FOR APPELLEE:

H. JOSEPH CERTAIN
MARTIN A. HARKER
Kiley, Harker & Certain
Marion, Indiana

IN THE
COURT OF APPEALS OF INDIANA

RODNEY SCOTT MONCE,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 27A02-0706-CV-462
	)	
MIDWEST WAREHOUSE CORP.	)	
d/b/a AUTO TECH AUTO PARTS, INC.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Natalie R. Conn, Judge
Cause No. 27D03-0608-PL-230

May 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Rodney Scott Monce appeals the trial court's entry of summary judgment in favor of his previous employer, Midwest Warehouse Corp. ("Midwest") d/b/a Auto Tech Auto Parts, Inc. ("Auto Tech"). Monce presents the following issues for our review:

I. Whether there was a genuine issue of material fact as to Monce's claim that he was terminated from his employment in retaliation for claiming worker's compensation benefits; and

II. Whether there was a genuine issue of material fact as to Monce's claim that Monce was terminated in violation of the Americans with Disabilities Act ("ADA").

We affirm.

FACTS AND PROCEDURAL HISTORY

Midwest is an automotive parts and accessories wholesale supplier serving northern Indiana. Since its 2003 merger with its subsidiary Auto Tech, Midwest's retail arm has done business under the name Auto Tech. Frank Gehlhausen ("Gehlhausen") is a shareholder, director, and officer of Midwest, and his responsibilities include managing the Auto Tech stores. Gehlhausen was Monce's supervisor.

Monce was an at-will employee who began working for Auto Tech in 1999 at its Peru, Indiana store. In mid-July 2003, Monce sustained a back injury when he lifted an automotive part from the floor of the cab of the company truck. The following day, Monce reported this injury to Gehlhausen, who advised Monce to see a physician. During the months of July and August 2003, Monce had two appointments with the doctor, an MRI, and an appointment with the Spine Institute. Monce's condition worsened and, following his August 15, 2003 appointment, the doctor "took [Monce] off work immediately." *Appellant's Br*. at 6. Monce submitted all of these medical bills to Auto Tech's health insurer, Anthem.

Soon thereafter, an agent for Anthem telephoned Gehlhausen and reported that Anthem would not pay for Monce's medical treatment because he did not qualify for medical insurance at the time the policy was written. The agent further noted that since Monce's medical records reflected that the injury was a work-related injury, the group health insurance would not apply in any event. Therefore, the agent advised that the injury should be reported to Auto Tech's worker's compensation carrier. *Appellee's Br.* at 3.

Gehlhausen contacted the insurance agent who had written Auto Tech's worker's compensation policy, Brett Cain. Cain advised that Midwest had changed its worker's compensation carrier on July 1, 2003. He further advised that, since Monce's medical records revealed that his injury arose due to aggravation of an injury that occurred prior to that date, the claim should be filed with the previous carrier, Selective Insurance ("Selective"). On September 1, 2003, Gehlhausen submitted a worker's compensation claim to Selective on Monce's behalf.

By letter dated September 17, 2003, Selective denied the claim. *Appellant's App.* at 70. After determining that the injury more likely occurred on July 16, 2003, Gehlhausen filed a second worker's compensation claim with Accident Fund,[1] the carrier that covered Midwest's worker's compensation claims in July 2003. *Id*. at 71. Accident Fund accepted coverage on September 26, 2003. Although Monce had been off work from August 15, 2003, Midwest paid Monce his full salary through the date that Accident Fund accepted the worker's compensation coverage.

Approximately one week after accepting coverage, Accident Fund provided Monce with a referral to see an orthopedic surgeon. The surgeon diagnosed Monce with a herniated disc and scheduled surgery. On October 1, 2003, Gehlhausen received a report from Accident Fund stating:

> [Monce] saw Dr. Shugart 9/30/03. Off work until surgery 10-3. Has herniated disc . . . . Will have surgery at FWO (Fort Wayne Orthopaedics) 10-03-03. Overnight stay. Dr. anticipated 2-4 weeks can do light duty (not more than 5 lbs lift/limited bend/twist). Full duty at 8-12 wks.

Appellant's App. at 73. Dr. Shugart performed surgery on October 3, 2003.

In mid-October 2003, after being notified about the timetable for Monce's return to work, Gehlhausen went to Monce's home to pick up the company computer, which contained information that Gehlhausen needed in order to make customer calls. While visiting, Gehlhausen learned that Monce was having trouble paying his bills and suggested that Monce could contact the worker's compensation carrier, contact the unemployment compensation office, or find some other type of employment.[2] *Appellee's Br.* at 5.

Dr. Shugart examined Monce on November 4, 2003, and authorized his return to work with the following restrictions: (1) alternate sit and stand as tolerated; (2) occasional bending, twisting, or stretching; and (3) no lifting over five pounds. *Appellant's App.* at 31. The doctor's restriction worksheet also provided: "If no job is available with the above

---

[1] In the record before us, the letters from the worker's compensation carrier bear the name of Crawford and Company. *Appellant's App.* at 72-79. However, in a deposition dated April 20, 2006, Gehlhausen testified that Crawford was merely a third-party administrator. *Id.* at 307.

[2] During the summary judgment hearing, Midwest's counsel referenced this exchange and stated, "[Monce] interprets that as being terminated as of that time. Uh, Midwest disputes that [was the date of termination], but for purposes of this summary judgment, we'll accept that as being termination as of that time. But for purposes of summary judgment only." *Tr.* at 6.

stated restrictions, consider patient 'off work' until next appointment." *Id*. at 31. Monce did not contact Gehlhausen, but continued under the care of his physician. At that time:

> Midwest had no place for [Monce] . . . . They only had the Auto Tech section and Midwest, for that matter, only [had] four (4) positions. All of which require[d] lifting and moving . . . accessories and parts and . . . products with weight in excess of ten (10) pounds. [A]ll require[d] bending, stretching, twisting, . . . crawling and indeed an outside sales position require[d] considerable driving.

Tr. at 6. After each of the three December 2003 appointments, the examining doctor completed a restriction worksheet, which released Monce to work with the same temporary restrictions. *Appellant's App*. at 38, 46, 47. Again, Monce failed to contact Gehlhausen or report for work.

On January 5, 2004, Monce received notice, through counsel, of the worker's compensation insurer's order "to report to work at the Logansport location beginning on 1-12-04 at 8:00 am." *Id*. at 196. He was further informed, "failure to report to work that is offered within given restrictions can cause a termination in TTD [temporary total disability] benefits." *Id*. Monce did not report to work. Also in January 2004, Monce received a letter from Gehlhausen stating that the company had several positions that would fit Monce's work restrictions. *Id*. at 197.

On January 22, 2004, Monce returned to Dr. Shugart and learned that his restrictions would be permanent. Monce could only perform a part-time six-hour per day job with no reaching, squatting, or crawling. Further, Monce was restricted to occasional bending and twisting with a sit/stand option at thirty-minute intervals. As far as pushing and pulling, Monce was limited to twenty pounds and, at a sedentary level, a maximum lifting of ten

pounds. Upon further inquiry, Gehlhausen learned that the "counterman" position he thought was appropriate required duties outside Monce's restrictions. *Id*. at 272. "On January 22, 2004, [Midwest] notified [Monce] that there was not a job available to [Monce] that fit his restrictions so he had to be released from employment." *Id*. at 187.

Around this same time, Monce began secretly taping his telephone conversations with Gehlhausen. During a January 22, 2004 telephone conversation, Monce asked Gehlhausen what Monce should tell the unemployment office regarding the reason for his discharge. Gehlhausen stated, "I told [the worker's compensation representative] that I did not have a job available to you that fits your restrictions. . . . I had to release you." *Id*. at 86.

On September 2, 2004, Monce filed his complaint alleging wrongful termination of his employment on January 22, 2004, by way of retaliatory discharge and violation of the ADA. *Appellant's App.* at 186-89. Midwest filed its motion for summary judgment, which the trial court granted on April 25, 2007. Monce now appeals.

DISCUSSION AND DECISION

Monce contends that the trial court erred by granting summary judgment in favor of Midwest on Monce's claim of retaliatory discharge and his claim that Midwest violated the ADA. Our standard of review for a trial court's grant or denial of a motion for summary judgment is well settled. *Purdy v. Wright Tree Serv., Inc.*, 835 N.E.2d 209, 212 (Ind. Ct. App. 2005), *trans. denied*. Summary judgment is appropriate only where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id*. (citing Ind. Trial Rule 56(C)). Appellate review of a summary judgment motion is limited to those materials designated to the trial court. *Id*. We do not reweigh the designated evidence,

Metal Working Lubricants Co. v. Indianapolis Water Co., 746 N.E.2d 352, 355 (Ind. Ct. App. 2001); rather, all facts and reasonable inferences drawn therefrom are construed in favor of the nonmovant. *Purdy*, 835 N.E.2d at 212. A grant of summary judgment may be affirmed upon any theory supported by the designated evidence. *Id.*; *Metal Working*, 746 N.E.2d at 355. Further, we carefully review the granting of summary judgment to ensure that a party was not improperly denied its day in court. *Purdy*, 835 N.E.2d at 212.

I. Retaliatory Discharge

Monce first contends that genuine issues of material fact remain as to whether his employment was terminated in retaliation for his having requested and received worker's compensation benefits. Generally, Indiana follows the employment-at-will doctrine. *Tony v. Elkhart County*, 851 N.E.2d 1032, 1035 (Ind. Ct. App. 2006). If there is no definite or ascertainable term of employment, then employment is presumptively terminable at any time, with or without cause, by either party. *Id*.

There are three exceptions to the employment-at-will doctrine. *Coutee v. Lafayette Neighborhood Hous. Servs., Inc.*, 792 N.E.2d 907, 911 (Ind. Ct. App. 2003), *trans. denied* (2004). Pertinent to this case is the public policy exception, which was established by the Indiana Supreme Court in *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d

425 (1973).[3] There, our Supreme Court held that when an employee is discharged solely for exercising a statutorily conferred right, an exception to the general rule of at-will employment is recognized. *Purdy*, 835 N.E.2d at 212 (citing *Frampton*, 297 N.E.2d at 428). Specifically, the *Frampton* court established that an action for retaliatory discharge exists when an employee is discharged for filing a worker's compensation claim. *Purdy*, 835 N.E.2d at 212 (citing *Frampton*, 297 N.E.2d at 428). This public policy exception to the general rule has been narrowly construed, as it is in derogation of the common law. *Dale v. J.G. Bowers*, 709 N.E.2d 366, 368 (Ind. Ct. App. 1999).

While "[t]he question of retaliatory motive for a discharge is a question for the trier of fact," *Powdertech Inc. v. Joganic*, 776 N.E.2d 1251, 1261-62 (Ind. Ct. App. 2002) (citing *Dale*, 709 N.E.2d at 369), our court has granted summary judgment on such a claim. *See Purdy*, 835 N.E.2d at 218. In *Powdertech*, this court noted, "[w]here causation or retaliation is at issue, summary judgment is only appropriate 'when the evidence is such that no reasonable trier of fact could conclude that a discharge was caused by a prohibited retaliation.'" *Powdertech*, 776 N.E.2d at 1262 (quoting *Markley Enter., Inc. v. Grover*, 716 N.E.2d 559, 565 (Ind. Ct. App. 1999)).

Accordingly, to survive a motion for summary judgment, the employee-plaintiff must show more than a filing of a worker's compensation claim and the discharge itself. *Id*.

[3] The remaining two exceptions to at-will employment are as follows. "First, if an employee establishes that 'adequate independent consideration' supports the employment contract, then the parties are considered to have intended to establish a relationship in which the employer may terminate the employee only for good cause." *Coutee v. Lafayette Neighborhood Hous. Servs., Inc.*, 792 N.E.2d 907, 911 (Ind. Ct. App. 2003), *trans. denied* (2004) (quoting *Orr v. Westminster Vill. N., Inc.*, 689 N.E.2d 712, 718 (Ind. 1997)). Second, "an employee may invoke the doctrine of promissory estoppel. To do so, the employee must assert

Rather, the employee must present evidence that directly or indirectly implies the necessary inference of causation between the filing of a worker's compensation claim and the termination. *Id*. This Court has outlined the three steps of a retaliatory discharge claim. *Purdy*, 835 N.E.2d at 213; *Powdertech*, 776 N.E.2d at 1262. First, the employee must prove, by a preponderance of the evidence, a *prima facie* case of discrimination. *Purdy*, 835 N.E.2d at 213 (citing *Powdertech*, 776 N.E.2d at 1262). The burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the discharge. *Id*. Finally, if the employer carries that burden, the employee can prove, by a preponderance of the evidence, that the reason offered by the employer is a pretext. *Id*. The employee can prove pretext by showing, for example, that the employer's proffered reason is factually baseless, is not the actual motivation for the discharge, or is insufficient to motivate the discharge. *Id*.

With these factors in mind, we review Monce's claim for retaliatory discharge. As the *prima facie* case, Monce alleged that he was discharged from Midwest in retaliation for having filed a worker's compensation claim. In response, Midwest stated "its reason for discharge was Monce's inability to perform the essential duties as an outside sales representative by reason of the work restrictions imposed by his physician." *Appellee's Br*. at 12. By doing so, Midwest fulfilled its burden to articulate a legitimate, non-discriminatory reason for the discharge. The burden then shifted to Monce to show that Midwest's stated reason for the discharge was merely a pretext cloaking a retaliatory motive. *Purdy*, 835 N.E.2d at 213.

---

and demonstrate that the employer made a promise to the employee, that the employee relied on that promise to his detriment, and that the promise otherwise fits within the Restatement test for promissory estoppel." *Id*.

Monce contends that there is a genuine issue of material fact both as to what date he was terminated and whether Midwest could have offered him a position within his physical restrictions. Although these factors can help determine motive, here, uncertainty as to these two factors does not, when considered with the evidence on the whole, create a genuine issue of material fact as to whether Midwest's stated reason for termination was merely a pretext.

Monce began working for Midwest in 1999. In 2002, Gehlhausen promoted Monce to the position of outside sales representative for northern Indiana. As part of his job, Monce had to drive several hours each day, load, unload, lift, bend, and twist in order to handle the delivery of automotive parts, accessories, and supplies, many of which were large and weighed more than ten pounds. Monce injured his back on or about July 16, 2003, while he was lifting an automotive part out of the cab of the company truck. After doctors ordered Monce off work on August 15, 2003, Gehlhausen filed for worker's compensation benefits on Monce's behalf. When the first carrier denied the claim, Gehlhausen filed a new claim with a second carrier, which was approved. Midwest paid Monce his full salary until the worker's compensation benefits began in mid-September. The worker's compensation benefits continued through October as Monce recovered from surgery. They also continued through November and December—months during which Midwest did not have a position that Monce could perform with the physician-ordered temporary work restrictions.

On January 22, 2004, Dr. Shugart also set forth permanent restrictions regarding working only six hours per day with no reaching, squatting, or crawling. *Appellant's App.* at 235. He also stated that Monce should only occasionally bend or twist and sit/stand at thirty-minute intervals. *Id*. at 236. As far as pushing and pulling, Dr. Shugart limited Monce to

twenty pounds and a sedentary lifting of only ten pounds. *Id*. Dr. Shugart reviewed Monce's functional capacity evaluation and noted, "[Monce] is at a sedentary physical demand level and recommended not being able to return to his regular job." *Appellant's App.* at 235.

In February 2004, after Monce had been terminated from his outside sales position, Gehlhausen provided Monce with a recommendation for use in obtaining future employment elsewhere, which provided in pertinent part:

> Monce . . . exhibited a superior knowledge of both the automotive parts and refinishing business. Scott is proficient and accustomed to selling the mechanical and fleet maintenance accounts . . . He was a "Man On The Mission" when given the opportunity to prove himself. He did much to increase our sales and I can recommend him with complete confidence.

Id. at 199.

The transcripts of the telephone conversations taped without Gehlhausen's knowledge reveal a relatively amicable relationship between the two men. Even in his unguarded moments, Gehlhausen never mentioned the worker's compensation claim without Monce's prompting. The following exchange occurred during a conversation on February 13, 2004:

> S[Monce]: . . . I know that I cost the company a lot of money you know with me having to go under workman's comp like that. I mean I understand, you know.
>
> F[Gehlhausen]: The day you actually filed it, I tried to do the right thing by you.
>
> S: Did they . .
>
> F: That I did.
>
> S: Did they raise your rates?
>
> F: Well, they won't raise them until the renewal. Then we will find out what happens.

Appellant's App. at 96. At the time of the termination, it was not clear to Gehlhausen whether Monce's claim would even affect the worker's compensation insurance rates.

As our court noted in *Purdy*:

> When reviewing retaliatory discharge cases on appeal, we do not take on the role of a "super-personnel department" that reexamines an entity's business decisions; rather, our inquiry is limited to whether the employer gave an honest explanation for its decision. *Powdertech, Inc.*, 776 N.E.2d at 1260. Stated another way, the issue of pretext does not concern the appropriateness of the reasons offered by the employer for its employment decisions. The court need only address the issue of whether the employer honestly believes in the explanation it offers. *Id*.

Purdy, 835 N.E.2d at 214.

Monce has failed to show the existence of any genuine issue of material fact that Midwest's reason for terminating his employment was a pretext, i.e., there is no evidence that Midwest's proffered reason was factually baseless, was not the actual motivation for the discharge, or was insufficient to motivate the discharge. *Purdy*, 835 N.E.2d at 213 (citing *Powdertech*, 776 N.E.2d at 1262). Monce's functional capacity evaluation recommended Monce "not being able to return to his regular job." *Appellant's App.* at 235. Dr. Shugart considered Monce at a "maximal medical improvement" and gave him a "whole person impairment rating of 13%." *Id*. at 236. When Gehlhausen suggested that Monce should look for a desk job, Monce responded, "Yeah, you know I can't do that. I'm not that type of person." *Appellant's App.* at 234.

Given the state of the record before us, we find that no reasonable jury could conclude that the reason given by Midwest for firing Monce was not the actual reason.

II. ADA Claim

Monce next contends that the trial court erred in granting Midwest's motion for summary judgment on the ADA claim. Specifically, he claims that a genuine issue of material fact remains as to whether he was discharged because of a disability covered under the ADA. In his complaint, Monce alleged:

> 18. From July 16, 2003 until the present time, Plaintiff has been suffering from a disability.
>
> 19. Defendant's refusal to continue Plaintiff in his employment or to place the Plaintiff in suitable employment is a direct violation [of the ADA] and Title VII of the Civil Rights Act of 1964 in that Defendant:
>
> a. Discriminated against Plaintiff with respect to the terms, conditions, or privileges of employment because of Plaintiff's disability; and
>
> b. Failed to accommodate or otherwise make available provisions to Plaintiff as required by law.

Appellant's App. at 188.

Under the ADA, an employer is prohibited from discharging a qualified employee on the basis of a disability. "To prevail in federal employment discrimination actions that allege discriminatory treatment, employees are required to satisfy the standards and burdens of proof enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973)." *Powdertech*, 776 N.E.2d at 1256. Like a retaliatory discharge claim, to prove discrimination under the ADA, the employee must first prove, by a preponderance of the evidence, a *prima facie* case of discrimination. *Id.* If the employee succeeds in proving a *prima facie* case of discrimination, the burden shifts to the employer to articulate a nondiscriminatory reason for the employment action at issue. *Id.* If the employer is able to articulate a nondiscriminatory reason, the burden shifts back to the employee to

prove that the articulated reason for the employment action was not the employer's true reason, but rather, was a pretext for discrimination. *Id*. "At all times, however, the employee retains the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee." *Id*.

As this court noted in *Powdertech,* to establish a *prima facie* case of discrimination under the ADA, and survive summary judgment, Monce is required to prove: "(1) he is disabled within the meaning of the ADA; (2) his work performance met [Midwest's] legitimate expectations; (3) he was discharged; and (4) the circumstances surrounding the discharge indicate it is more likely than not that his disability was the reason for the discharge." *Id*. (citing *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 922 (7th Cir. 2001)).

Therefore, to prevail on a claim of employment discrimination, an ADA plaintiff "must meet the threshold burden of establishing that he is 'disabled' within the meaning of the statute." *Powdertech*, 776 N.E.2d at 1257 (citing *Roth v. Lutheran Hosp.*, 57 F.3d 1446, 1453-54 (7th Cir. 1995)). Title I of the ADA "prohibits discrimination against a 'qualified individual with a disability' based upon such person's disability regarding a term or condition of employment." *Id*. (quoting 42 U.S.C. § 12112(a)). "The ADA defines a 'qualified individual with a disability' as 'an individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires." *Id*. (quoting 42 U.S.C. § 12111(8)). "Moreover, the ADA defines 'disability,' in pertinent part, as a 'physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . .'" *Id*. (quoting 42 U.S.C. § 12102(2)(A)).

Having an impairment does not make one disabled for purposes of the ADA. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195, 122 S. Ct. 681, 690 (2002). The claimant must also demonstrate that the impairment limits a major life activity. *Id*. As Monce correctly notes: "Major life activities are functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." *Appellant's Br*. at 13. "For the major life activity of working, the regulations define 'substantially limits' as being:

> Significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i)." *Powdertech*, 776 N.E.2d at 1257-58.

Monce contends that there is a genuine issue of material fact as to whether he was discharged in violation of the ADA. In his complaint, Monce merely states, "From July 16, 2003 until the present time, Plaintiff has been suffering from a disability." *Appellant's App.* at 188. To prove a violation of the ADA, Monce must present evidence that he is unable to perform tasks central to most people's lives, not merely that he is unable to perform occupation-specific activities. *Toyota*, 534 U.S. at 200-01. As outside sales representative Monce had to sit for long periods of time, bend, lift, and carry heavy equipment when he drove to visit customers and to deliver automotive products. While these activities were essential to the job of outside sales representative, Monce has failed to show how his impairment is deemed to limit a major life activity.

Midwest did not discriminate against Monce because he was a person with a disability. Instead, Monce was terminated from the job of outside sale representative because he could not perform the essential duties of that position.

Like the trial court, we find no genuine issue of material fact to preclude entry of summary judgment in favor of Midwest on Monce's claims that he was fired in violation of the ADA or in retaliation for filing a worker's compensation claim.

Affirmed.

RILEY, J., and MAY, J., concur.